

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs November 15, 2013

DENISE L. HEILIG v. ROY HEILIG

**Direct Appeal from the Circuit Court for Shelby County
No. CT00623907 Donna Fields, Judge**

No. W2013-01232-COA-R3-CV - Filed February 28, 2014

Years after the parties divorced, they agreed to entry of a consent order requiring the mother to cooperate with the father in obtaining passports for the parties' two minor children. Months later, the father filed a petition for contempt, alleging that the mother had refused to cooperate in executing the necessary documents. The trial court found the mother in contempt for willfully refusing to execute the documents. The mother appeals, arguing that the trial court did not have subject matter jurisdiction to enter the order finding her in contempt, citing the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), because the parties no longer live in Tennessee. She also argues that the trial court erred in holding her in contempt. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., joined, and HOLLY M. KIRBY, J., partially concurred and partially dissented separately.

Denise Heilig, Belleville, IL, *pro se*

Christine W. Stephens, Memphis, Tennessee, for the appellee, Roy Heilig

OPINION

I. FACTS & PROCEDURAL HISTORY

Denise Heilig (“Mother”) and Roy Heilig (“Father”) were divorced by decree of the Circuit Court of Shelby County, Tennessee, on November 12, 2008. The final decree of divorce incorporated a marital dissolution agreement and also a parenting plan, which provided that Mother would have primary custody of the parties’ two minor children. The parties had previously resided in Arlington, Tennessee, but by the time of the divorce, Mother and the children had moved to Illinois.

Less than a month after the divorce decree was entered, Mother and Father began to have disagreements over numerous issues. Mother filed a motion to compel mediation in accordance with the parenting plan’s requirement that the parties attempt to mediate disputes. The parties attended mediation by agreement on February 4, 2009, and they resolved some but not all of the issues between them. The parties filed a series of additional post-divorce motions and petitions over the next several years. On April 7, 2009, Mother filed a petition that formally sought, among other things, a modification of the permanent parenting plan. On May 28, 2010, Mother filed an amended petition seeking a further modification of the permanent parenting plan. According to Mother’s brief on appeal, Father moved from Tennessee to Pennsylvania in July of 2010.¹ Consequently, from that point forward, neither the children nor the parents resided in Tennessee. However, they continued to litigate their pending post-divorce disputes in the Tennessee trial court.

The parties returned to mediation on February 4, 2012. On April 25, 2012, the divorce court entered a “Consent Order Regarding Mediated Settlement Agreement,” which stated that the parties’ attorneys had appeared in court and announced that the parties had reached an agreement regarding all outstanding issues between them. Relevant to this appeal, the consent order provided:

Passports for Children: Mr. Heilig will take care of getting the information and paperwork for the children to apply for new passports and will pay for same. Mother will cooperate with execution of any documents necessary to accomplish this. Father will keep possession of said passports but will not

¹ It is not clear from the record precisely when Father moved to Pennsylvania. A July 9, 2010 order allowing Father’s attorney to withdraw contains a certificate of service listing Father’s address in Arlington, Tennessee. However, a September 21, 2010 petition filed by Father, pro se, lists his address in Pennsylvania. Thus, it appears that Father moved from Tennessee to Pennsylvania sometime between July and September of 2010.

unreasonabl[y] withhold them from Mother should she have the opportunity to take the children out of the country for vacations.

Nearly six months after entry of the consent order, on October 22, 2012, Father filed a “Petition for Scire Facias and Civil and Criminal Contempt of Court,” alleging, among other things, that he had taken the necessary steps and provided the necessary paperwork to Mother in order to have the replacement passports issued for the two minor children, and that Mother had refused to cooperate in executing the necessary documents. Father alleged that he was forced to cancel a family vacation that was planned for the summer of 2012 due to Mother’s “contemptuous noncompliance.”

Mother appeared *pro se* at the hearing on Father’s motion on January 25, 2013. We do not have a transcript of this hearing, but the trial court’s order entered thereafter states that Mother signed the necessary passport documents just prior to the beginning of the hearing. Despite this last-minute attempt at compliance, the trial court found Mother in criminal and civil contempt of court for failing to execute the documents at an earlier date. The court found that Mother’s testimony regarding why she did not sign the paperwork earlier was not credible, and that she had “refused to sign the necessary paperwork for the minor children’s passports as requested and Ordered in the Consent Order.” The court found that Mother “had the ability to comply with the previous Orders of this Court and willfully refused to do so.” Consequently, the court ordered that Mother would be incarcerated from the conclusion of the hearing until 10:00 p.m. that evening, and that she must pay \$3,000 in attorney’s fees incurred by Father. Mother timely filed a notice of appeal to this Court.

II. ISSUES PRESENTED

Mother presents three issues in her *pro se* brief on appeal. Mother’s first issue is simply stated as, “Jurisdiction.” In this section of her brief, she refers to two provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) as support for her argument that the trial court lacked jurisdiction to “even hear[] this case.” We will address this argument below.

For issues two and three, Mother basically argues that there was a lack of evidence regarding whether Father ever provided the necessary passport documentation to her, and that the petition for contempt was filed “prematurely” since the consent order did not contain “a date that [Mother] was bound by.” However, we will not consider these two issues on appeal because Mother did not cite to the record in support of either of these issues, and she did not provide a single citation to authority in support of these arguments. In fact, the latter issue is simply stated as an issue with no argument section developing her argument whatsoever, and the argument section for the second issue consists of four sentences. “It is not the role of the courts, trial or appellate, to research or construct a litigant’s case or arguments for him

or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.” *Sneed v. Bd. of Prof'l Responsibility of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010). “Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue.” *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (quoting *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000)); see also *Tellico Village Property Owners Ass'n, Inc. v. Health Solutions, LLC*, No. E2012-00101-COA-R3-CV, 2013 WL 362815, at *3 (Tenn. Ct. App. Jan. 30, 2013) (quoting *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001)) (“Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal.”) Simply put, “[a]n issue may be deemed waived, even when it has been specifically raised as an issue, when the brief fails to include an argument satisfying the requirements of Tenn. R. App. P. 27(a)(7).” *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012).

While we realize the “legal naivete” of a pro se litigant, “we must not allow him an unfair advantage because he represents himself.” *Frazier v. Campbell*, No. W2006-00031-COA-R3-CV, 2006 WL 2506706, at *3 (Tenn. Ct. App. Aug. 31, 2006) (citing *Irvin v. City of Clarksville*, 767 S.W.2d 649, 651-52 (Tenn. Ct. App. 1989)). “Pro se litigants who invoke the complex and technical procedures of the courts assume a very heavy burden.” *Irvin*, 767 S.W.2d at 652. They are entitled to fair and equal treatment, but they must follow the same substantive and procedural requirements as a represented party, and they may not shift the burden of litigating their case to the courts. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000).

III. DISCUSSION

A. *The UCCJEA*

On appeal, Mother argues that, pursuant to the UCCJEA, the trial court lacked jurisdiction to enter the order finding her in contempt for failure to execute the passport documents. She points out that she and the children moved from Tennessee to Illinois in 2008, and that Father moved from Tennessee to Pennsylvania in 2010. She argues, “Since neither party has lived in the state of TN for over 3 years, Jurisdiction falls in the state of Illinois where the minor child[ren] have lived since 2008 and not in the courts in TN.” We disagree.

“Whether a court has subject matter jurisdiction over a case is a question of law that we review de novo with no presumption of correctness.” *Morgan Keegan & Co., Inc. v.*

Smythe, 401 S.W.3d 595, 602 (Tenn. 2013) (citing *Word v. Metro Air Servs., Inc.*, 377 S.W.3d 671, 674 (Tenn. 2012)). The Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), codified at Tennessee Code Annotated section 36-1-201, et seq., “governs jurisdiction between Tennessee and other states over child custody proceedings.” *Button v. Waite*, 208 S.W.3d 366, 369 (Tenn. 2006). The UCCJEA defines a “child custody proceeding” as “a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue,” and it includes such proceedings as those for “divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue [of custody or visitation] may appear.” **Tenn. Code Ann. § 36-6-205(4)**. The Act similarly defines a “child custody determination” as “a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.” **Tenn. Code Ann. § 36-6-205(3)**.

Even assuming arguendo that a dispute over a passport would be considered a “child custody proceeding” subject to the UCCJEA, this does not mean that the trial court lacked jurisdiction to resolve this case simply because the children and the parents had moved outside the State of Tennessee. As noted above, Mother filed petitions seeking various modifications of the parenting plan on April 7, 2009, and on May 28, 2010. Mother claims that Father moved to Pennsylvania in *July* 2010. Therefore, the petitions for modification of the parenting plan were already pending when Father moved out of state, and the trial court had jurisdiction over any custody and visitation issues, pursuant to the UCCJEA, when the petitions for modification were filed. We recognize that Tennessee Code Annotated section 36-6-217 provides that a Tennessee court that has made an initial custody determination retains continuing, exclusive jurisdiction over the custody matter *until*, among other things, a court determines that “the child, the child's parents, and any person acting as a parent do not presently reside in this state.” But the official comment to the statute provides:

Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding.

So, the trial court had jurisdiction under the UCCJEA to enter the 2012 consent order, addressing, among other things, custody issues, even though none of the parties lived in Tennessee at the time the order was entered.

We likewise find that the UCCJEA would not deprive the trial court of subject matter jurisdiction to enter the order finding Mother in contempt of its 2012 consent order. In *In re Marriage of Medill*, 179 Or. App. 630, 40 P.3d 1087 (Or. Ct. App. 2002), the Oregon

Court of Appeals faced a similar issue. After obtaining a divorce and initial custody determination from an Oregon trial court, the father returned to court and initiated a modification proceeding and a contempt proceeding against the mother. *Id.* at 632-33. The Court of Appeals concluded that the Oregon trial court had jurisdiction under the UCCJEA to make the initial custody determination in the context of the divorce proceeding, but that it lacked jurisdiction to *modify* that custody determination under the UCCJEA where the children and mother did not reside in Oregon, they had no significant connection to Oregon, and substantial evidence concerning their welfare was not available there. *Id.* at 638. Despite this ruling that the trial court had lost jurisdiction to modify custody, the Court held that the trial court *did* have jurisdiction to adjudicate the father's petition for contempt in which he alleged various violations of the existing parenting plan. *Id.* at 646-47. The Court noted that "[t]he UCCJEA does not expressly address the enforcement of a custody determination made, as here, by a court of a state that no longer has jurisdiction to modify that determination[.]" *Id.* at 646. However, the "UCCJEA does contain extensive provisions concerning the enforcement of child custody determinations made by *another* state," (emphasis added), and the UCCJEA's definition of "child custody proceeding" specifically excludes "enforcement" proceedings under those sections. *Id.* The Court found that these provisions suggest that a child custody determination, within the meaning of the UCCJEA, "does not include an order *enforcing* an existing custody determination." *Id.* The Court also pointed out that the statutory definition of a "child custody determination" means "a judgment, decree, or other order of a court *providing* for" custody or visitation. *Id.* The Court said, "That definition logically excludes a contempt judgment that does not *provide* for custody or parenting time but, rather, merely *enforces* an existing custody determination." *Id.* The Court also noted that its conclusion made practical sense "because the trial court's loss of jurisdiction to modify the existing custody determination does not, by force of logic, render that determination unenforceable." *Id.* at 646-47. Tennessee's version of the UCCJEA contains a provision substantially similar to Oregon's in this regard:

- (a) A child-custody determination made by a court of this state that had jurisdiction under this part binds all persons who have been served in accordance with the laws of this state or notified in accordance with this part or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard.

- (b) As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

Tenn. Code Ann. § 36-6-209. In sum, the Oregon Court concluded that "unless and until a further custody determination is made by a court having jurisdiction to modify the custody determination, the trial court has authority to enforce by contempt proceedings the only

custody determination and parenting plan that currently exists.” *In re Marriage of Medill*, 179 Or. App. at 647; *see also Nelson v. Norys*, No. 2004-CA-001725-ME, 2005 WL 1792116, at *2 (Ky. Ct. App. 2005) (“a [Kentucky] court entering an initial custody determination retains authority to enforce that decree by contempt proceedings until a further custody determination is made by another court having jurisdiction”).

In our case, the Father filed the petition for contempt, seeking to enforce the 2012 consent order, after all the parties had moved from Tennessee. Even if this fact means that the Tennessee court would not have had jurisdiction to *modify* the 2012 consent order, it could still *enforce* the order in the contempt proceeding. No other court had assumed jurisdiction to enter a contrary order. In conclusion, the UCCJEA would not deprive the trial court of jurisdiction to enforce the 2012 consent order even though the parties had moved from Tennessee.

B. Attorney’s Fees

Father has requested an award of his attorney’s fees on appeal, asserting that Mother’s appeal was frivolous. Tennessee Code Annotated section 27-1-122 provides for an award of sanctions in the form of attorney’s fees when an appeal is determined to be frivolous. “A frivolous appeal is one that is ‘devoid of merit such that it had no reasonable chance of succeeding.’” *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 341 (Tenn. 2010) (quoting *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 50 n.4 (Tenn. 2004)). The statutory authorization for awarding attorney’s fees “reflect[s] the view that successful parties should not have to bear the costs and vexation of baseless appeals.” *Id.* at 342. Still, “care must be taken by the courts to avoid discouraging legitimate appeals,” so “imposing a penalty for a frivolous appeal is a remedy which is to be used only in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable—which is rare.” *Id.* Exercising our discretion, we respectfully deny Father’s request for attorney’s fees on appeal.

IV. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is hereby affirmed. Costs of this appeal are taxed to the appellant, Denise Heilig, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.